Indiana Law Journal

Volume 24 | Issue 4 Article 8

Summer 1949

The Cloture Rule

PARLIAMENTARY LAW

THE CLOTURE RULE

At the beginning of the 81st Congress the Majority leaders in the Senate, anticipating obstruction by "filibusters," proposed to amend the Senate Rules to provide for more effective limitation on debate. A motion was made to take up

---

19. If identification by virtue of compulsory voice exhibition is to be disallowed, it must be done upon some other ground, such as:

(a) *Undue prejudice.* The principal case was decided purportedly as a violation of the privilege. Yet, the court in obscure language, indicates that the evidence should have been excluded solely because the specific words were uttered. If the particular words were such as would rouse the passion of the jury, the evidence might be subject to exclusion as unduly prejudicial (6 WIGMORE, EVIDENCE Sec. 1904); but so far as the privilege itself is concerned, the undue prejudice argument is irrelevant. Opposing exclusion on an undue prejudice basis is the fact that the most accurate method of identification is to present the suspect to the witness in as near as possible the same conditions as originally observed. 3 WIGMORE, EVIDENCE Sec. 786a. For valuable discussion see Gorphe, F., *Showing Prisoners To Witnesses for Identification,* 1 AM. J. POLICE SCI. 79 (1930).

(b) *Unreliability of the Identification.* Relatively little research appears to have been done in this area, but see: 27 J. CRIM. L. & CRIMINOLOGY (1936); McGeehee, F., *The Reliability of the Identification of the Human Voice,* 17 J. GEN. PSYCHOLOGY 249 (1937), and comment thereon in 33 J. CRIM. L. & CRIMINOLOGY 487 (1943); McGeehee, F., *An Experimental Study of Voice Recognition,* 31 J. GEN. PSYCHOLOGY 53 (1944). For cases accepting voice identification see 2 WIGMORE, EVIDENCE Sec. 660, n.1.

(c) *Violation of procedural due process of the U. S. Const. Amend. XIV.* To date that evidence which has been excluded by virtue of the due process clause has been only involuntary confessions. However, the scope of procedural due process does not appear to be limited to confessions, in view of its underlying policy: ". . . to prevent fundamental unfairness in the use of evidence, whether true or false." Lisenba v. California, 314 U. S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941); Watts v. Indiana, 69 Sup. Ct. 1347, 1348, n. 2 (1949). But whether this due process fair trial rule will ever be utilized to compel the exclusion of non-confessional evidence is an open question.

(d) *Waiver.* Many courts have avoided a determination of what constitutes testimony by finding that the accused waived his privilege when, as a matter of fact, he had no privilege to waive. *E.g.,* People v. Salas, 17 Cal. App.2d 75, 61 P.2d 771 (1936); State v. Watson, 114 Vt. 543, 49 A.2d 174 (1946); Spitler v. State, 221 Ind. 107, 46 N. E.2d 591 (1943); State v. Cash, 219 N. C. 818, 15 S. E.2d 277 (1941).

a resolution,[1] which would amend the then ineffective Cloture Rule.[2] Subsequent discussion on the motion eventually developed into a "filibuster."[3] In an attempt to preclude further debate, the Majority filed a cloture petition with the Presiding Officer. A Member immediately made a "point of order"—whether the Cloture Rule permitted such a petition to be filed on a *motion* to take up a measure, as distinguished from resolutions, bills and other business.[4] Ruling on this point of order, Vice President Barkley as President of the Senate, held that the phrase "pending measure" in the Cloture Rule includes any business before the Senate, including a motion, and therefore a cloture petition could be filed in this instance.[5] On appeal, the Senate body declined to sustain the Chair's ruling, thereby negatively implying that Cloture could not be applied to a motion.[6] The unrestricted "filibuster"

---

1. This resolution was to amend the Cloture Rule by providing that cloture petitions could be filed on motions or any other business before the Senate. 95 CONG. REC. 1355 (Feb. 17, 1949) and 95 CONG. REC. 1617 (Feb. 28, 1949).

2. The Senate adopted the Cloture amendment to Senate Rule XXII on March 8, 1917, which reads:

> "If at any time a motion, signed by sixteen Senators, to bring to a close the debate upon any *pending measure* is presented to the Senate, the Presiding Officer shall state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by an aye-and-nay vote the question:
>
> 'Is it the sense of the Senate that the debate shall be brought to a close?'
>
> And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.
>
> Thereafter no Senator shall be entitled to speak in all more than one hour on the *pending measure*, the amendments thereto, and motions affecting the same . . ." (Italics added.)

SEN. J. 234, 64th Cong. 2d Sess. (1917); SENATE MANUAL, Sen. Doc. 172, 75th Cong. 3d Sess., pp. 27-28.

3. The Southern opposition to the "Civil Rights" legislation culminated in the "filibuster" on the motion to change the Senate rules, which was the first step in a maneuver to insure passage of the legislation.

4. 95 CONG. REC. 2216 (March 10, 1949).

5. See 95 CONG. REC. 2217-18 (March 10, 1949) for the complete Barkley ruling.

6. The Senate vote on the point of order was 46 to 41 in favor of reversing the Chair. The Senate body is the ultimate authority as the Constitution states that "Each House may determine the Rules of its Proceedings . . . " Art. I, § 5. For all practical purposes therefore, the Senate rules mean only what the majority say they mean.

See II HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1340 (1907), for Chair's authority to rule and right of appeal.

was then resumed, until urgent business necessitated a solution to the dilemma in the form of a compromise amendment.[7]

In any body regulated by parliamentary procedure a proper balance must be struck between summary action by the majority in complete disregard of the minority rights and failure of action desired by the majority resulting from obvious dilatory debate. Sufficient discussion should be allowed to manifest the merits and defects of a particular issue, but curtailed before becoming an organ of obstruction.[8] The most common device to effectuate this balance is the "previous question" rule,[9] which originated in the Parliament of England,[10] and is now employed in our House of Representatives.[11] In its simplest form the rule consists merely of a motion to vote on the pending issue without further discussion, which can be carried by the vote of two-thirds of the body.

In the Senate a Cloture Rule has been used to restrict unwarranted discussion since 1917. Prior to that time, excepting temporary use of the "previous question" and other restrictions, the Members possessed the privilege of unlimited debate.[12] The nature of the Senate and the high caliber of its Members differentiated it from the House and other parliamentary bodies and indicated that a definite rule for limitation would not be required. However, on numerous occasions this privilege was flagrantly abused by a few Senators to promote their cause at the expense of detering all action by

---

7. After a Southern Democrat-Republican coalition, an amendment to the rule was accomplished which permitted Cloture on any matter, except a motion for a change in the rules, by a vote of two-thirds of the *full Senate.* The Rule as amended established effective Cloture, the desire of the Majority, but at the price of making it more difficult to invoke. Previously Cloture required only two-thirds of those voting, while under the new rule two-thirds of the complete Senate is necessary. Now a Senator absent or not voting in effect votes against Cloture. 95 CONG. REC. 2768-73 (Mar. 17, 1949).

This is significant as a step away from the goal of majority Cloture advocated as one measure to improve the Senate Rules. See *Should Debate in the Senate be Further Limited,* 5 CONG. DIGEST 291 (1926).

8. See CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES 304-316 (1863); LUCE, LEGISLATIVE PROCEDURE ch. I; WILLOUGHBY, PRINCIPLES OF LEGISLATIVE ORGANIZATION, pp. 316-318.

9. See V HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 5443 (1907).

10. *Id.* at § 5445.

11. *Id.* at §§ 5456, 5446; and *VIII* CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2661 (1921).

12. See HAYNES, THE SENATE OF THE UNITED STATES, p. 392 (1938); VIII CANNON, *op. cit. supra* note 11 § 2663.

the Majority.[13] To alleviate this abuse, a determined Senate, intent upon preventing the use of dilatory practices during the national emergency of World War I,[14] adopted a Cloture amendment to the Senate Rules providing for a limitation upon debate of any "pending measure" when two-thirds of the voting Senators so desired.[15]

In later sessions of the Senate, experience revealed two major weaknesses which threatened to undermine the application of the Cloture Rule.[16] The first, appearing in 1922, arose in connection with the approval of the Journal, at the beginning of each legislative day, which was at that time a privileged question holding priority in the order of business.[17] Rulings held that Cloture was inapplicable to such a motion.[18] The second and more serious flaw became evident when rulings from the Chair apparently held that Cloture could not be applied to a *motion* to take up a measure, for it was not a "pending measure" as that phrase is employed in the Cloture Rule.[19]

The consequences of the development of these flaws in the Cloture Rule was that the Senate, in effect, had no limita-

---

13. HAYNES, *op. cit. supra* note 12, ch. VIII; BURDETTE, FILIBUSTERING IN THE SENATE, chs. II and III (1940); WILLOUGHBY, *op. cit.* note 8, at p. 486 (1934); *Legislative History of the Cloture Rules in the Senate,* 92 CONG. REC. 638 (1946); Potterf, *Limitation of Debate in the United States Senate: A Phase of the Law-Making Process,* 1 IND. L. J. 139; VIII CANNON *op. cit. supra* note 11 §§ 2666-2670. For a series of articles exploring the merits, pro and con, of limitations of debate, see Moses, *The Senate and Its Rules* 198 Sat. Eve. Post (June 27, 1925); DAWES, *Reform of the Senate Rules,* 198 Sat. Eve. Post 3 (Nov. 28, 1925); Moses, *Speaking of the Senate,* 204 Sat. Eve. Post 8 (July 25, 1931).

14. Filibusters on the Armed Ship bill indicated to the Senate the need of a cloture amendment. Subsequent history of the Cloture Rule is found in BURDETTE, *op. cit. supra* note 13, ch. V; Pepper, *Senate Cloture,* 74 U. OF PA. L. REV. 131 (1925); Galloway, *Limitation of Debate in the United States Senate,* Public Affairs Bulletin No. 64 (Oct. 1948); *Should Debate in the Senate be Further Limited,* 5 CONG. DIGEST 291 (1926).

An excellent collection of discussions, speeches, and other material relating to limitation on debate in the Senate is found in *Hearings before the Committee on Rules and Administration of the United States Senate,* SEN. DOC. No. 10, 81st Cong. 1st Sess. (1949).

15. See note 2 *supra.*

16. HAYNES, *op. cit. supra* note 12, at 402.

17. The practice arose as a construction of Senate Rule III, ". . . the Journal of the preceding day shall be read, and any mistakes made in the entries corrected . . . and when any motion shall be made to amend or correct the same, it shall be deemed a privileged question, and proceeded with until disposed of." SENATE MANUAL p. 6, 75th Cong. 3d Sess.

18. *E.g.* see 63 CONG. REC. 325, 388, 438, 446 (1922).

19. See 58 CONG. REC. 8413, 8547, 8554 (1918); 68 CONG. REC. 4900, 4903, 4975, 4981, 4985, 5167 (1927); 92 CONG. REC. 802, 871, 883, 951, 1037 (1946); and 94 CONG. REC. 9752 (Aug. 2, 1948).

tion on debate. As in the case of other parliamentary bodies, procedure in the Senate requires most business to be initiated by a motion,[20] including the approval of the Journal at the beginning of each new legislative day. If business can be deadlocked at this stage, then the vulnerability of the Senate's procedure to "filibusters" is patent.[21] This was the status of the Cloture Rule when Vice President Barkley ruled that a cloture petition could be filed on a motion as a "pending measure."

The reasons for the Senate's failure to sustain Barkley's ruling was explained by the Senate's Rules Committee.[22] It contended that prior rulings held that a cloture petition could not be applied to a motion and necessitated a ruling by Barkley of a similar nature.[23] However, the Senate did concede that the prior rulings were erroneous interpretations, in the sense that they abrogated the creating Senate's "intent" to provide for an effective limitation on debate by gutting the Cloture Rule.[24] The Senate proposed to correct these rulings by amendment.[25]

20. HAYNES, *op. cit. supra* note 12, at 374; GILFRY, PRECEDENTS OF THE UNITED STATES SENATE, p. 487 (1909).

21. The instant situation is a splendid example of this vulnerability; for as Cloture could not be used to stop the "filibuster" on the motion to take up the resolution changing the rules, business was curtailed until one side acquiesced. The Southern-Democrats formed a coalition with the Republican minority, and then terminated the "filibuster," being assured of sufficient votes to allow only a favorable amendment to pass.

22. The Committee's position is found in a report accompanying a resolution to amend the Cloture Rule. See SEN. REPORT 69, 81st Cong. 1st Sess. (1949).

23. The Committee apparently had not sufficiently scrutinized the prior rulings to discover that they covered the point of order only by dicta.

For discussions of why Cloture may not be applied to a motion see speeches by Senators Saltonstall in 95 CONG. REC. 2214 (Mar. 10, 1949), and Vandenberg in 94 CONG. REC. 9753 (Aug. 2, 1948), 95 CONG. REC. 2274 (Mar. 10, 1949). *Contra:* Senator Lucas, 95 CONG. REC. 2210 (Mar. 10, 1949).

24. The Rules Committee stated: "The fact that over five years elapsed before the first flaw in the cloture provisions of Rule XXII was developed and that a much longer time expired before a second serious flaw was discovered is a definite indication that every Senator who voted to amend Rule XXII in 1917 did so with a clear understanding that he was voting for an enforceable rule to close debate and not to produce a result, as Mr. Vanderberg stated, 'That, in the final analysis, the Senate has no effective cloture rule at all . . . .'"

"That such a result was not intended . . . [because] no statement by any Senator who was a Member of the Senate in 1917 has been found which would indicate . . . he was aware that the rule had loopholes in it which made it of no value as a means of bringing debate to an end. There is no evidence to show that any one of them was aware that the rule would prove to be ineffective and that he supported it with any mental reservations or any purpose of evasion." SEN. REP. 69, 81st Cong. 1st Sess. p. 2. (1949).

25. See note 7 *supra.*

When the question of interpretation was put before the Chair by a "point of order," Barkley found that there had never been a direct ruling on whether cloture petition could apply to a motion. Therefore, as the apparent precedents were not in point in this instance, it was free to rule that a motion falls within the purview of the term "pending measure" and is subject to Cloture.[26] There were four previous relevant interpretations of the Rule, which were responsible for the flaws and had been established as apparent precedent. A clear analysis of these rulings reveals that in each instance there had been some *other* business before the Senate which was determined to be the pending measure to which Cloture applies, instead of the *motion* on which the Cloture petition was filed.[27] It is thus evident that the cloture petition was out of order because it *was* not, rather than because it *could* not be filed on a motion constituting the "pending measure." As these prior rulings were not in point, but could be distinguished away, the Chair was not bound by parliamentary precedent, but completely free to rectify erroneous dicta presented in former decisions.[28] The Senate was not warranted then in its refusal to sustain the Chair's ruling.

---

26. See note 5 *supra.*

27. The distinguishment is essentially as follows: In the first ruling a cloture petition was filed on the amendments to the Treaty, whereas the Treaty itself was the unfinished business before the Senate, thus cloture action on the amendments were out of order. See 58 CONG. REC. 3413, 8547 and 8554 (1919).

In the second ruling by Dawes, the cloture petition was again not filed on a measure under consideration by the Senate. See 68 CONG. REC. 4900, 4903, 4975, 4981, 4985, 5167 (1927).

A motion to amend the Journal, being a privileged question, had replaced the Fair Employment Practices Commission Bill on which a cloture petition was filed, thus cloture was not filed on the pending business in the McKellar ruling. See 92 CONG. REC. 802.

The Vandenberg ruling, which clearly expresses the position contra to the Barkley holding, involved a situation in which an aviation bill was the business before the Senate, or pending measure. A motion was made to consider an anti-poll-tax bill. Then a petition for Cloture was filed on the anti-poll-tax bill. A Member raised a point of order which the Chair sustained by deciding that the motion to take up the anti-poll-tax bill could not be entertained until the Senate had disposed of the aviation bill. Thus both the motion for the anti-poll-tax bill and the cloture petition filed on it were out of order. However, the Chair unnecessarily added, to rule on the point of order, that "pending measure" as used in the Cloture Rule did not include a motion. See 94 CONG. REC. 9752 (Aug. 2, 1948).

28. Even Vandenberg concedes this in his ruling, "There has been no direct ruling upon the specific question whether a motion to take up a bill is subject to cloture. It has been recognized and understood that such is not the case, on the grounds that a motion cannot reasonably be construed to be a pending measure within the meaning of the cloture rule." 94 CONG. REC. 9752 (Aug. 2, 1948).

Nor was the Senate correct in concluding that an amendment was necessary to rectify this situation. Even assuming the prior rulings were in point in the present instance, the Senate's position requiring amendment is unsound as a means of remedying the defective rule. The proper method would be to allow the Chair to exercise its prerogative to overruling the decisions of clearly erroneous interpretations.[29] This would be in accord with a well recognized exception to the doctrine of Stare Decisis—interpretations as precedent which defeat the very purpose of the rules and are plainly wrong should be freely overruled.[30]

In finding prior rulings binding on the Chair the Senate erred, and in requiring amendment to erase previous erroneous interpretations the Senate sacrificed the principles of parliamentary law in favor of political expediency.

TAXATION

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

In the recent case of *Spiegel's Estate v. Comm'r,* 335 U. S. 701 (1949), the United States Supreme Court held that application of the "intended to take effect at . . . death" provision of § 811 (c)[1] of the Internal Revenue Code to an

29. Senator Vandenberg expresses the opposition to such a proposal: "If the Senate wishes to cure this impotence it has the authority, the power, and the means to do so. The President pro tempore of the Senate does not have the authority, the power or the means to do so except as he arbitrarily takes the law into his own hands." 94 CONG. REC. 9753 (Aug. 2, 1948).

For reference to the powers and duties of the Chair see: WILLOUGHBY, *op. cit. supra* note 8 at 532; LUCE, LEGISLATIVE PROCEDURE, chs. XIX and XX (1922); CUSHING, *op. cit. supra* note 8, at pp. 110-115, 567-572; HATCH & SHOUP, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES ch. VI (1934); GILFRY, PRECEDENTS IN THE UNITED STATES SENATE, p. 448 (1909).

Examples of other *"constructive rulings,"* where the Chair followed principles of policy rather than precedent, see 55 CONG. REC. 2436 (1919), and WILLOUGHBY, *op. cit. supra* note 8 at 482; VIII CANNON, *op. cit. supra* note 11, at § 2424.

See also VI CANNON, *op. cit. supra* note 11, at § 48, where the Chair followed precedent although he could find no intrinsic reason for sustaining the point of order.

30. WELL, RES ADJUDICATA AND STARE DECISIS, ch. XLV and p. 545 (1878); BLACK, LAW OF JUDICIAL PRECEDENT, p. 199 (1912).

1. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . . to the